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FIRST APPELLATE DISTRICT

DIVISION 3

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WEIBEL, Defendant and Appellant.	A131510 (San Francisco County Super. Ct. No. 212692)

Defendant and appellant Michael Weibel appeals his jury trial conviction on the charge of first degree burglary, in violation of Penal Code, section 459.[1] Defendant contends the trial court erred in denying his motion for mistrial resulting from an alleged *Brady*[2] violation. Finding defendant's contention unpersuasive, we affirm.

PROCEDURAL BACKGROUND

In July 2010, the San Francisco District Attorney filed a single-count information charging defendant with first degree burglary (§ 459). Additionally, in relation to the charge of first degree burglary, the information alleged: (1) a person other than an accomplice was present in the residence during the commission of the offense, rendering the offense a violent burglary within the meaning of section 667.5, subdivision (c)(21); (2) defendant suffered three previous felony burglary convictions (§ 667, subds. (a), (d) & (e); § 1170.12, subds. (b) & (c)); and (3) defendant had served three prior prison terms (§ 667.5, subd. (b).)

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1 All further unspecified statutory references are to the Penal Code.

2 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

The matter was tried to a jury in October 2010. The jury returned a guilty verdict on the charge of first degree burglary and found true the allegation that the burglary was violent, within the meaning of section 667.5, subdivision (c)(21). Subsequently, the trial court found defendant had suffered two previous felony convictions. The court granted the prosecutor's motion to dismiss defendant's third prior serious felony conviction in the interests of justice.

On March 10, 2011, the trial court sentenced defendant to prison for an aggregate term of 18 years. Defendant filed a timely notice of appeal on the day of sentencing.

FACTS

On January 26, 2010, Esther Menache (Esther) heard the sound of glass breaking somewhere in the bottom floor of her home at 160 Eucalyptus Drive in San Francisco. Esther went downstairs, locked the door leading to her son, Robert Menache's (Robert) bedroom and then waited to see if anyone tried to enter the main living area.[3] Just then, Esther looked out the window and saw a man she subsequently identified as defendant walking along the side of her house. She made eye contact with the man and noticed he was holding a bag. Esther testified that she got a good look at the man because at one point, the man was no more than seven feet away from her and turned his face towards her as she watched him through the window. The man was white, about five feet six inches tall, 50 to 60 years old, and had white hair. She noted he was wearing a jacket, but did not focus on the color of the jacket because she was "concentrating on the look of his face the most." Esther then saw the man walk on Eucalyptus Drive toward the Municipal Railway (Muni) track on the corner between 19th avenue and Ocean Avenue. Esther noticed the glass window on the door to her son's room had been shattered and then called both her children, who in turn alerted the police.

Sergeants Dave Rodriguez and Jaine Haymond from the California State University Police Department (CSUPD) arrived first at Esther's house around 4:25 p.m.

[3] Robert Menache described the house as a split level home with two bedrooms and a bath on the top floor, a kitchen, dining area, and living room on a mezzanine level, and his bedroom on the lower floor "sort of underneath [his mother's] bedroom."

Esther told the CSUPD sergeants that the man she saw holding a bag along the side of her house "had a dark jacket and had white hair." She also told them that the suspect headed down Eucalyptus towards the Muni stop. Sergeant Rodriguez immediately started walking toward the Muni stop while Sergeant Haymond remained with Esther. As he walked toward the Muni stop, Sergeant Rodriguez relayed Esther's description of the suspect to dispatch and within a minute or so, another officer informed Sergeant Rodriguez of the location of a man that matched that description. Sergeant Rodriguez ran southbound down the Muni tracks and noticed the man matching the description about 100 feet away. The man glanced toward Rodriquez and took off running southbound on Rossmoor Drive Sergeant Rodriguez testified that the man was wearing a light or tan colored jacket and that he was too far way to notice if he had a bag. The man turned a corner and Sergeant Rodriguez lost sight of him.

Minutes later, a man driving a truck, Frederick Meiswinkel, flagged down Sergeant Rodriguez and told him he saw an older man with a bag run into the backyard of 51 Elmhurst. Sergeant Rodriguez decided not to follow the man into the backyard for officer safety reasons but instead doubled back towards Rossmoor in order to get to back to 19th avenue. As he approached the Muni stop between Eucalyptus Drive and Ocean Avenue, Sergeant Rodriquez was stopped by a female who directed him to an idle Muni Light Rail Vehicle (LRV) located on the light rail tracks. Sergeant Rodriguez and other CSUPD and San Francisco Police Department (SFPD) officers conducted a car-by-car search for the man by looking through the windows as they walked along the outside of the train. During the search, a passenger, Ashley Galloway, told Officer Haymond that she saw the person, subsequently identified as defendant, board the train and try to stuff various items under his seat. Based upon Galloway's report of defendant's suspicious behavior Sergeant Rodriguez and other officers boarded the LRV and took defendant into custody. Galloway showed the officers where defendant had stowed objects under a seat on the LRV. The objects, a pocket watch and some car keys, were recovered and subsequently identified by Esther's son (Robert) as his property.

SFPD officers drove Esther to the defendant's location to participate in a "cold showup" for identification purposes. Esther did not identify the defendant immediately because he was about 50-70 feet away, but when he was brought within 20 feet, she identified the defendant without hesitation, saying "[h]e's the one."

Another witness, Laura Dunn, approached officers at the Muni stop and told SFPD Officer Dana Terry that someone had tossed a black bag into a garbage can in her father's backyard at 83 Rossmoor Drive. The bag contained, inter alia, a Blackberry phone, a digital camera, a video game device, sunglasses, and a dark blue hooded sweatshirt. Robert testified at trial that all of the items, other than the sweatshirt, had been in his room before he left for work that day. He thought the sweatshirt may have been left in his room by a nephew who occasionally visits.

SFPD Sergeant Robert Padrones transported defendant to the Taraval District police station and inventoried his personal items, which included a pair of cufflinks.[4] When asked about the cufflinks, the defendant claimed he owned them. Robert testified at trial that the cufflinks in fact belonged to him and were taken from his room.

DISCUSSION

A. Background

At trial, Officer Mulliken testified that the defendant was wearing a brown jacket at the time of his arrest. He acknowledged, however, that he wrote in his police report and testified at the preliminary hearing that the defendant was wearing a black jacket. When pressed by defense counsel as to why he changed his testimony, Officer Mulliken explained that he made a typo in his police report when he recorded the color of the jacket and that he relied on his police report in order to refresh his memory during the preliminary hearing. During his pre-trial preparation meeting with District Attorney Tiffaney Gipson, he was shown photographs of the defendant on the day of his arrest and

[4] The cufflinks were not taken from defendant at the scene of his arrest because the arresting officers performed a "cursory" search for large objects that could be used as weapons. The cufflinks in defendant's pocket were not considered to be dangerous enough to be removed from his person.

realized his error. Officer Mulliken explained he alerted District Attorney Gerald Norman,[5] the attorney assigned to conduct the preliminary hearing and District Attorney Gibson, when she was assigned to the case, regarding his mistake concerning the color of defendant's jacket.

At the conclusion of Mulliken's trial testimony, defendant moved for a mistrial based on the prosecution's nondisclosure of exculpatory evidence in violation of *Brady, supra,* 373 U.S. 83. Defense counsel argued: "[T]he prosecution learned prior to the opening statement in this case and being assigned to this department that Officer Mulliken, the author of the main report in the case, was actually recanting his testimony about a significant aspect of the case. [¶] That information is impeachment. Impeachment is *Brady* material, and that *Brady* material should have been turned over." District Attorney Gipson explained that the discrepancy wasn't new information and that the officer's testimony was due to a mistake, stating: "Unfortunately that's what happens when witnesses are called in to testify several months after an incident occurs, and if you try to refresh their memory with inaccurate information, then you're going to give inaccurate information when you testify." Gipson argued that the officer was impeached and it was "not a situation where the People were hiding material information." The trial court denied the motion because the only new information in Officer Mulliken's testimony was the explanation for the inconsistency and there was strong impeachment of the officer on the issue. The court also explained that "there has not been an explanation offered to the court as to how things would have been different in this trial" with the new information. Nevertheless, the trial court instructed the jury as follows: "In this case, the prosecution failed to disclose that Officer Allen Mulliken had advised them that some statement that he made in both his police report and while under oath at the preliminary hearing regarding the clothes worn by the perpetrator were erroneous. [¶] The prosecution was under a legal obligation to disclose that those statements were erroneous

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[5] District Attorney Gipson took over the case a few weeks before trial when District Attorney Norman was called away unexpectedly.

and the basis for error. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of the late disclosure."

B. Applicable Legal Principles

In *People v. Salazar* (2005) 35 Cal.4th 1031 (*Salazar*), our Supreme Court noted that under *Brady*, " 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " (*Salazar, supra,* 35 Cal.4th at p. 1042, quoting *Brady*, *supra*, 373 U.S. at p. 87.) Moreover, the prosecution has a duty to disclose such evidence even when not requested by the defendant. (*United States v. Agurs* (1976) 427 U.S. 97, 107 (*Agurs*).)

" 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*Salazar, supra,* 35 Cal.4th at p. 1043.) Prejudice focuses on the materiality of the evidence relating to guilt and innocence. (*Agurs, supra,* 427 U.S. at p. 112 & fn. 20.) "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682 (*Bagley*).)

"Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review. [Citation.]" (*Salazar, supra,* 35 Cal.4th at p. 1042.) However, "[b]ecause the referee can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence." (*Ibid.*)

C. Analysis

Defendant argues that the trial court erroneously denied his motion for mistrial based on the prosecution's alleged violation of its duty under *Brady* and therefore his

conviction should be reversed. We disagree. Assuming the prosecution knew Officer Mulliken intended to testify at trial that defendant wore a brown jacket at the time of his arrest, not a black jacket as Mulliken testified at the preliminary hearing, and further assuming Mulliken's intended change in testimony was impeachment evidence, nevertheless no *Brady* violation occurred because, as detailed below, the evidence at issue was disclosed, and, moreover, does not meet *Brady*'s materiality requirement.

1. The Prosecution Did Not Suppress Evidence

The duty to provide relevant evidence to the defense under *Brady* applies to all members of the "prosecution team", which includes both investigative and prosecutorial personnel. (*In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).) That duty is ongoing, and continues "throughout the duration of the trial and even after conviction." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383-84.) However, evidence introduced at trial, even though undisclosed to the defense beforehand, is not considered suppressed under *Brady*. (See *People v. Morrison* (2004) 34 Cal.4th 698, 715; see also, *United States v. Slocum* (1983) 708 F.2d 587, 600 [holding that newly discovered evidence does not warrant a new trial unless it was discovered following trial and the movant demonstrates due diligence to discover it prior to trial].) Here, the evidence regarding Mulliken's error in recording the actual color of the jacket was not suppressed, a predicate requirement to establish a *Brady* violation. To the contrary, Mulliken's error was disclosed during trial and defense counsel was allowed to vigorously cross-examine Officer Mulliken on the discrepancy and to argue to the jury that the prosecutor had failed her legal obligation to disclose the evidence.[6] Accordingly, defendant's *Brady* error fails because he cannot meet the "suppression" component of a *Brady* violation.

[6] The court's instruction to the jurors on the prosecution's failure to fulfill her legal obligation requiring disclosure of the evidence to the defendant further bolsters the argument that such evidence was not suppressed.

2. The Evidence Was Not Material

Moreover, to establish a *Brady* violation, it is not enough that the prosecution suppresses favorable evidence; in addition, the evidence at issue must be material, i.e., its suppression must result in prejudice to defendant. (See *Bagley, supra,* 473 U.S. at p. 682; *Salazar, supra,* 35 Cal.4th at p. 1043.) Defendant argues that the prosecution's failure to disclose the reason for Officer Mulliken's erroneous testimony was material because it undermined his identity defense and trial strategy of using possible inconsistencies in witness statements to establish reasonable doubt defendant was the burglar. Defendant's argument on this point is meritless.

" 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations] or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony" [citations].' [Citation.]" (*Salazar, supra,* 35 Cal.4th at p. 1050.)

Because the evidence of defendant's guilt was strong independent of Officer Mulliken's erroneous recordation of the color of the perpetrator's jacket, we have no trouble concluding that appellant cannot establish prejudice in support of his assertion of *Brady* error. We note first that the defendant was identified by Esther as being alongside her house right after she heard glass breaking and she gave a consistent description of the suspect to multiple police officers. She made eye contact with the defendant as he was leaving and explained on cross-examination that she focused on his face and his hair and not the color of his clothes. When the defendant was apprehended near the Muni stop, Esther positively identified him as the man she saw on her property during a "cold show." In addition, Sergeant Rodriguez, based on Esther's information regarding the path defendant took in leaving her house, and information received from dispatch, observed a man – matching dispatch's description—and chased him southbound on Muni and southbound on Rossmoor Drive until he lost him. Sergeant Rodriguez identified defendant as the person matching the description of the suspect to whom he gave chase.

Esther also told police that the man she saw walking along side her house was carrying a black bag with him. Robert's property was found inside of a black back pack retrieved from the backyard of 83 Rossmoor by SFPD officers. The residence at 83 Rossmoor is located along the route defendant ran in his attempt to evade Sergeant Rodriguez.

Furthermore, a witness on the Muni car, Ashley Galloway, testified that she saw defendant board the train and attempt to hide items under his seat. The items were identified as Esther's son's property. Finally, during an inventory search of his person subsequent to his arrest, defendant falsely claimed ownership of cufflinks taken from Robert's room.

In sum, on this record we are confident that even if defense counsel had been advised of Officer Mulliken's erroneous recordation and preliminary hearing testimony with respect to the color of the coat defendant wore at the time of his arrest, no reasonable probability exists that the outcome of the proceeding would have been different. (See *Bagley*, *supra*, 473 U.S. at p. 682 [under *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome"].) Accordingly, because defendant has failed to establish the evidence at issue was material, his *Brady* claim fails on this component as well.[7]

DISPOSITION

The judgment is affirmed.

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[7] Under "Argument" in the table of contents to Appellant's Opening Brief, it states "II. Appellant requests that this court conduct an independent review of the in camera hearing on the *Pitchess* motion." Counsel has submitted an Errata informing this court that the reference to Argument II in the table of contents was an error, and there is no argument concerning the *Pitchess* motion on appeal.

Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.